Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	**MB Docket No. 10-71**
The Commission's Rules Governing	)	**MB Docket No. 07-42**
Retransmission Consent	)	

REPLY COMMENTS OF HDNet LLC

Introduction

These Reply Comments are submitted in MB Docket No. 10-71 (and are also submitted as an ex parte filing in MB Docket No. 07-42) on behalf of HDNet LLC ("HDNet"), an independent programming company delivering two 1080i high definition ("HD") channels known as "HDNet" and "HDNet Movies." HDNet provides viewers with the best in original comedy, drama, news, sports, and music programming. HDNet Movies is the only movie network in the world that features original feature films on the same date, and prior to, the national theatrical release.

Independent programmers, neither affiliated with any multi-channel video programming distributor ("MVPD") nor with the major content companies that provide many channels to MVPDs, have become scarcer over the past several years.

In a significant number of instances, independent programmers have faced substantial difficulties gaining and retaining carriage on reasonable terms from MVPDs. This can be true even when independent programmers obtain better ratings than other networks.

These difficulties in obtaining and retaining carriage have a variety of causes, some of which simply entail overcoming the reasonable challenges that all businesses may face. Other causes are not nearly so benign.

Restrict Wholesale Tying

First, as reflected in several comments in this docket, cable companies often assert that they cannot carry more independent programming because space is scarce. When big programmers bundle or tie reasonable carriage terms for "must have" channels to carriage of a host of their other channels that lack popularity and have small or non-existent audiences, this scarcity is unfairly and artificially inflated. Wholesale bundling and tying take up channel space that should otherwise be available to independent programming preferred by viewers. HDNet has previously urged the Commission to end wholesale tying in order to benefit consumers and help create a level playing field for independent programmers in obtaining carriage.

Applying these principles, in any rulemaking that the Commission might engage in associated with this proceeding, the Commission should forbid broadcasters from tying or bundling other channels in which they hold an interest with the channels that are subject to "must carry" and retransmission consent negotiations. Special regulatory obligations that apply only to broadcast channels should not be permitted to be leveraged in order to gain carriage of other channels affiliated with broadcast channels. This is an abuse of the regulatory process which unfairly restricts the ability of independent voices to be heard, and denies consumers the chance to enjoy diverse programming.

Comply With Statutory Requirements to Provide Expedited Review to Certain Complaints by Independent Programmers

Second, in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress recognized the vulnerability of independent programmers when it comes to carriage and some of the incentives of MVPDs. These pressures may grow even more intense to the extent that broadcasters bundle, leaving fewer channels available for independent and other programming.

Congress placed some important but modest limits on the behavior MVPDs can engage in when making programming and carriage choices. 47 U.S.C. § 536. More specifically, among other limitations, Congress prohibited MVPDs from requiring a financial interest in a programmer as a condition of carriage and from unreasonably restraining the ability of an independent programmer to compete fairly by discriminating in the selection, terms or conditions for carriage on the basis of affiliation or non-affiliation. *See* 47 U.S.C. § 536 (a) (1) and (3).

To provide for swift and effective enforcement of these prohibitions, Congress commanded that the FCC conduct an "expedited review" when independent programmers submit complaints alleging that these prohibitions have been transgressed. 47 U.S.C. § 536 (a) (4). Given the vulnerability of independent programmers to the MVPDs on which they depend to reach consumers, only a rapid and well-defined process that applies reasonably clear standards will be feasible for most independent programmers to invoke. Congress also specifically chose and set forth in the statute how to balance this right— it specifically provided the FCC with the ability to assess penalties for filing frivolous claims. 47 U.S.C. § 536 (a) (6).

The FCC, however, has never written rules that assure in any way an expedited review, nor has it applied the rules it has to handle such complaints in a way that complies with the statute and provides the required "expedited review." The requirement that the FCC establish regulations (within one year of the October 5, 1992 enactment) that provide for expedited review of any complaint that alleges a violation of 47 U.S.C. § 536 is neither a suggestion nor an option— it is a Congressional mandate and children born when it became the law are now entering college. Yet the FCC has never fulfilled its duty to act as Congress directed. Particularly, in recent years, a number of these complaints have been filed at the FCC by independent programmers even in spite of the FCC's failure of implementation; but, if not resolved by settlement, they have taken years to obtain and complete FCC review. That is hardly the expedited review that was, and remains, required.

In light of this failure of the FCC to comply with statutory directives which were designed to provide some protection to independent programming, and the resulting harm, we urge the FCC to implement this law promptly. This will also make it clear that the FCC doesn't follow two standards of justice: one that provides a prompt response when powerful media companies are among those seeking intervention, as in the instant Petition, and another that woefully disregards even specific statutory mandates intended by Congress to protect less powerful, more vulnerable independent voices. Accordingly, we urge that the FCC complete the open rulemaking in MB Docket No. 07-42 now, and certainly no later than it may act on the matters raised in the instant Petition.

The Arguments of Some MVPDs in This Proceeding Buttress the Rules Sought in MB Docket No. 07-42

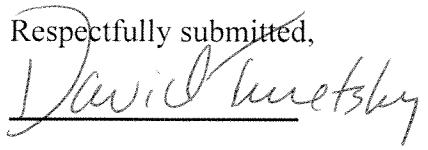
Third, the comments by MVPDs in this proceeding reflect an evolution of views that should make it easier to adopt the rules urged by independent programmers, public interest groups, and others in MB Docket No. 07-42. In that proceeding, independent programmers have been seeking a six-month shot clock that would provide for the expedited review of complaints and decision-making required by the 1992 Cable Act; preservation of the "status quo" pending FCC review of a complaint asserted under the 1992 Cable Act, by staying any adverse action against a programming channel (such as a tier change or termination of carriage) that is alleged to constitute a violation until an "expedited review" is provided; a prohibition on retaliation against independent programmers for exercising their rights under the 1992 Cable Act; and adoption and clarification of applicable standards, including of a "prima facie" case.

The parallels between some of the comments supporting the instant Petition and the reasoning supporting the four provisions mentioned above for adoption in MB Docket No. 07-42 are worth noting. In this retransmission consent proceeding, some MVPDs argue for solutions quite similar to those proposed by independent programmers in MB Docket No. 07-42. Some MVPDs are now urging that the Commission adopt dispute resolution procedures that include a provision providing for interim carriage of the broadcast station or a similar result. This is similar to the request that the status quo be preserved in a programming dispute under 47 U.S.C. § 536, pending expedited review, when an independent programmer already has carriage that is about to be changed or terminated allegedly in violation of the statute. Likewise, some MVPDs now argue that it is important for the Commission to achieve more procedural and other certainty around

programming issues, in this case those associated with retransmission consent; and recognize that free market negotiations do not solve all issues or negate the need for any regulatory process, intervention, or decision-making. These sentiments provide additional support for action in MB Docket No. 07-42, although are just icing on the cake given that Congress has already issued a mandate to the Commission. If the FCC needs any further reasons to establish rules that provide for expedited review of carriage complaints as Congress has required, however, we hope that it will find that additional support in the embrace of these principles by MVPDs.

HDNet does not seek FCC compliance with the requirement to provide expedited review of actionable carriage complaints because it is waiting with anticipation to file such complaints. To the contrary, HDNet hopes and believes that clear regulatory guidance will complement private negotiations and make negotiations more likely to achieve outcomes consistent with the limits set by Congress. A right without an effective remedy is like having no right at all. Today, neither MVPDs nor independent programmers have reason to think that a possible statutory violation would be redressed by the FCC in a timely and effective manner. That can add further tension to negotiations. When that view changes, however, parties should have a greater incentive to negotiate carriage arrangements within the binding and enforceable parameters Congress intended for the conduct of such negotiations. That will hopefully foster the achievement of results that comply with the law, thus reducing the need to file complaints.

Respectfully submitted,



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